PUBLIC FINANCE BERHAD

v.

EHWAN BIN SARING

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD GHAZALI BIN MOHD YUSOFF J
[CIVIL APPEAL NO. 12-58-OF 1993]
19 SEPTEMBER 1995

***HIRE PURCHASE**: Purchase of motor car by way of hire purchase - Car seized by Customs and Excise Department during the course of the hiring - Car subsequently forfeited under s. 128(1) of the Customs Act 1967 - Hirer suing for return of sum paid towards the purchase price - Whether there was breach of s. 7(1) of the Hire Purchase Act 1967 - Whether there was total failure of consideration - Meaning of the words "at the time when the property is to pass" appearing in s. 7(1)(b) and (c) of the Hire Purchase Act - Whether such "time" only arises when a hirer has made his last payment under a hire purchase agreement - Hirer signing letter of indemnity - Whether letter of indemnity contravened s. 34(g) of the Hire Purchase Act - Whether letter of indemnity contravenes s. 24(b) of the Contracts Act 1950 - Whether letter of indemnity enforceable - Whether contract between hirer and financier frustrated - Applicability of s. 57(2) of the Contracts Act 1950.*

The appellant appealed against the decision of the learned Sessions Court Judge allowing the respondent's claim in respect of breach of conditions and warranties arising out of a hire purchase agreement with regard to the purchase of a motor car entered into between the respondent (as hirer) and the appellant (as owner).

It was stated in the agreement that the hiring shall be deemed to have commenced on 27 March 1991 and that the hirer shall pay 23 monthly instalments of RM1,178 each and a final instalment of RM1,156.

During the course of the hiring the vehicle was seized by the Customs and Excise Department for an alleged offence under s. 135(1)(d) of the Customs Act 1967 and was subsequently forfeited under the provisions of s. 128(1) of the same Act. The respondent filed an action claiming that by reason of the seizure by the Customs Department, the appellant had breached s. 7(1) of the Hire Purchase Act 1967 (the Act). The respondent pleaded that there was a total failure of consideration and claimed for the return of the RM57,000 which he had paid towards the purchase price and for other expenses incurred.

The appellant counter-claimed for losses and damages and relied on a letter of indemnity signed by the respondent at the same time the hire purchase agreement was entered into. Counsel for the appellant argued that there was

no breach of s. 7(1)(b) and (c) of the Act as the words "at the time when the property is to pass" found in those paragraphs denote that such "time" only arises when a hirer has made his last payment under a hire purchase agreement and that in the instant case such "time" has not arisen as the last payment was not then due.

The appellant also argued that, by virtue of clause 3 of the letter of indemnity signed by the respondent, he is estopped from making this claim. It was also argued that the letter of indemnity does not contravene s. 34(g) of the Act and that in any event s. 34 only applies to a hire purchase agreement and the letter of indemnity is not part of the said hire purchase agreement.

Held:

[1] The conduct and action on the part of the appellant clearly show that when the said agreement was entered into, the appellant represented that they are the owners of the said vehicle which would mean that they represented that they were capable of giving a good title to the respondent whenever the latter decided to pay the net balance due resulting in the termination of the hiring. Subsequent to the seizure of the vehicle by the Customs Department the said agreement has become void under s. 57(2) of the Contracts Act 1950 as it would now be impossible for the appellant to make over all its rights, benefit and interest in the said vehicle as they have a defective title.

[2] The appellant had received an advantage under the said agreement, namely, the RM57,000 which the respondent has paid towards the purchase of the said vehicle. As the agreement is void and as it would be impossible for the appellant to pass a good title over the said vehicle, the provisions of s. 66 of the Contracts Act require the appellant to return the RM57,000 which they had received from the respondent.

[3] It is clear that s. 7(4) of the Act has preserved the common law position that the owner must have a good title to pass when he enters into a hire purchase agreement and in the circumstances there was no merit in the appellant's contention that the common law position is not applicable on the basis that the vehicle is a second-hand vehicle and that such an implied condition can be excluded by the letter of indemnity.

[4] It cannot be disputed that the appellant had held themselves out to be the owner of the vehicle and had represented that they were capable of giving a good title to the respondent whenever he might choose to end the hiring by paying the net balance due. Upon that event occurring the appellant had warranted in clause 8 of the hire purchase agreement that the said vehicle shall become the property of the respondent and that they would assign and make over their rights, benefit and interest in the said vehicle to the respondent. The evidence adduced has shown that the

appellants were incapable of doing that from the time they entered into the agreement and in the circumstances there was no merit in the appellants' argument that there was no breach of s. 7(1)(b) of the Act.

[5] A breach of s. 7(1)(b) of the Act amounts to a breach of condition and is a breach which goes to the root of the agreement which would entitle the hirer to recover the amount already paid by him. That is the position at common law and that is also the position under the Act regardless of whether the goods are new or otherwise. In the present case, the appellants who had represented that they were the owners of the vehicle, later discovered that their title was defective. That is a breach of condition which goes to the root of the said agreement so that liability on the part of the respondent under the agreement comes to an end entitling him to recover the amount paid by him to purchase the said vehicle from the appellants.

[6] The words "at the time when the property is to pass" means at the time when the hirer decides to pay all the sums due under a hire purchase agreement, namely, at the time when a hirer exercises his option to purchase, and not necessarily only upon payment of the last instalment when it becomes due.

[7] There was no merit in the argument that clause 4 of the hire purchase agreement excluded warranties in respect of second-hand vehicles. The Act does not differentiate between new goods and second-hand goods as far as ownership is concerned and neither does s. 7(1) or 7(2) of the Act have anything to do with ownership or title. Clause 4 of the said agreement had nothing to do with ownership and did not exclude any implied condition or warranty as to title under the Act or under common law.

[8] The letter of indemnity forms part and parcel of the hire purchase agreement and has been worded in such a way as to exclude the provisions of law which are implied under the Act. The letter of indemnity goes against the provisions of the Act, which provisions are meant to provide protection to hirers, and insofar as the letter of indemnity is a part of the hire purchase agreement, it is void under s. 34(a),(b) and (g) of the Act as the right of the respondent to seek relief under the provisions of the Act and also at common law have been wrongfully precluded.

[9] The appellants' title was defective and hence no good title could be transferred to the respondent. The agreement had been frustrated when the said vehicle was seized and the appellants had breached the implied conditions and warranties provided for under s. 7(1) of the Act. In the circumstances the respondent was entitled to the return of the RM57,000 with interest and costs. As the appellants' counterclaim was dependent on the letter of indemnity and as the letter of indemnity was void, the

learned Sessions Court Judge was right in dismissing the appellants' counterclaim.

[Appeal dismissed with costs].

Cases referred to:
Ahmad Ismail v. Malayan Motor Company & Anor. [1973] 2 MLJ 66 ***(dist)***
Richards v. Alliance Acceptance Co. Ltd. & Anor. [1976] 2 NSWLR 96 ***(refd)***
Goh Yew Chew & Anor. v. Soh Kian Tee [1970] 1 MLJ 138 ***(refd)***
Warman v. Southern Counties Car Finance Corporation Ltd. [1949] 1 All ER 711 ***(refd)***
Karflex Ltd. v. Poole [1933] All ER Rep 40 ***(foll)***
Rowland v. Divall [1923] 2 KB 500 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 24(b), 34, 57(2), 66, 128(1)
Customs Act 1967, ss. 114, 128(1), 135(1)(d)
Hire Purchase Act 1960 (NSW), ss. 5(5), 7(4)
Hire Purchase Act 1967, ss. 6(1)(b), 7(1)(b), (c), (2), (3), (4), 13(1), 34, (a), (b), (g)

For the plaintiff - Low Kim Leng; M/s. Soo Thien Ming & Shahrizat
For the respondent - Teh Poh Teik; M/s. Teh Poh Teik & Co.

JUDGMENT

Mohd Ghazali Mohd Yusoff J:

This is an appeal against the decision of the Sessions Court Judge, Sessions Court, Johor Bahru wherein the learned Sessions Court Judge allowed the respondent's claim for the sum of RM57,000 together with interest and costs in respect of breach of condition and warranties arising out of a hire-purchase agreement with regard to a purchase of a motor-car, dated 27 March 1991, entered into between the respondent (as hirer) and the appellant (as owner) and dismissed the appellant's counterclaim for a sum of RM25,294.01 being the sum of money paid by the appellant to purchase the said motor-car from its previous owner.

The facts of the case are as follows:

The respondent purchased a motor-car bearing registration No. JBX 2923 (hereafter referred to as "the said vehicle") from one Tan Chin Cheng (hereafter referred to as "Tan") at an agreed price of RM82,000 and paid a sum of RM57,000 out of which RM40,517.97 was paid to Tan and the balance of RM16,482.03 to the appellant, a finance company, for the purpose of settling Tan's outstanding account with the appellant as the said car was still under finance by the appellant. For the balance of RM25,000 the respondent entered into a hire-purchase agreement (hereafter referred to as 'the said agreement") with the appellant on 27 March 1991 wherein that sum was advanced by the appellant to pay Tan the balance of the purchase price.

In the said agreement, the appellant is described as "the owner" and the respondent as "the hirer". The said agreement referred to the said amount of RM57,000 which was earlier paid by the respondent, as being the deposit and that the amount payable by the respondent to the appellant under the said agreement is RM28,250 (inclusive of term charges). It was also stated in the said agreement that the hiring shall be deemed to have commenced on 27 March 1991 and that the hirer shall pay 23 monthly instalments of RM1,178 each and a final instalment of RM1,156.

However on 8 May 1991 the said vehicle was seized by the Customs and Excise Department for an alleged offence under s. 135(l)(d) of the Customs Act 1967; that section reads:

> Whoever .... knowingly harbours, keeps, conceals or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods ... shall be guilty of an offence ...

The evidence adduced at the trial shows that on that date, the Customs issued a notice of seizure (page 94 of the Appeal Record) pursuant to s. 114 of the Customs Act to the respondent and informed him that if he wished to claim that the said vehicle is not liable for forfeiture, he must give notice to the Customs and make a claim within one month from the date of seizure failing which the vehicle will be deemed to be forfeited under the provision of s. 128(l) of the Customs Act; s. 128(l) reads:

> If there be no prosecution with regard to any goods seized under this Act, such goods shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of the seizure unless a claim thereto is made before that date in the manner hereinafter set forth.

By a letter dated 13 May 1991 the appellant gave instructions to their solicitors to write to "the relevant authorities" for the return of the said vehicle as they "are the hire purchase owners of the said vehicle" (page 100 of the Record of Appeal) and by a letter dated 19 May 1991, their solicitors wrote to the customs to inform that their client, the appellant, is the lawful owner of the said vehicle and requested for its return. The customs replied on 20 July 1991 informing the appellant's solicitors that the matter was still under investigation for a suspected offence relating to the vehicle's import permit and/or duty.

Subsequently by a summons dated 27 July 1991 the respondent (plaintiff) filed an action in the Sessions Court, Johor Bahru against the appellant (defendant) claiming that by reason of the seizure by the Customs, the appellant has breached s. 7(1) of the Hire Purchase Act 1967 (hereafter referred to as "the said Act); s. 7(1) reads:

In every hire-purchase agreement there shall be:

(a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;

(b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

The respondent also pleaded that there has been a total failure of consideration. The respondent's claim is for the return of the RM57,000 which he has paid towards the purchase price of the said vehicle and also for the sum of RM4,935.10 which he has expended for repairs towards the vehicle, its insurance premium and the transfer fee and certain charges imposed by the appellant, making it a total of RM61,935.10.

The appellant counter-claimed - they pleaded that on the same day that the said agreement was entered into, the respondent has also signed a letter of indemnity wherein he agreed, *inter alia*, to indemnify the appellant against all losses, damages including liquidated damages in the event the appellant loses the title and possession of the said vehicle. The damages as quantified by the appellant was RM25,294.01 inclusive of costs and interest. On 27 October 1993 the learned Sessions Court Judge allowed the respondent's claim for the return of the RM57,000 with interest and costs and dismissed the appellant's counter-claim. The appellant appealed.

It is not disputed that the respondent has paid a total sum of RM57,000 for the said vehicle, *viz*., by way of a direct payment of RM40,517.97 to the said Tan and by way of a direct payment of RM16,482.03 to the appellant, to settle Tan's outstanding account with the appellant as the said vehicle was still under finance by the appellant when the respondent purchased it.

At the trial, the appellant insisted that it was the respondent who approached them for a loan of RM25,000 to pay for the balance price of the said vehicle in the form of a hire-purchase and upon approval of his application, they paid Tan the said balance and that since they are now the owner of the said vehicle, they are entitled to claim the RM25,000 from the respondent. In his submission, Counsel for the appellant argued that there was no breach of s. 7(1)(b) and (c) of the said Act as claimed by the respondent as the words "at the time when the property is to pass" found in those paragraphs denote that such "time" only arises when a hirer has made his last payment under a hire-purchase agreement and that in the instant case, such "time" has not arisen as the last payment was not then due. To support his argument he referred to the case of *Ahmad Ismail v. Malayan Motor Company & Anor.* [1973] 2 MLJ 66.

In that case, the facts show that the first defendant was a second-hand car dealer whilst the second defendant was a finance company. On 18 December 1969 the plaintiff decided to buy a second-hand car for RM4,900 from the first defendant; he traded-in his car and received a credit of RM1,200 and paid the first defendant a sum of RM1,000. As he could not pay the balance of RM2,700 he entered into a hire-purchase agreement with the second defendant under which the latter was referred to as the "owners" and the plaintiff as the "hirer". Under the said agreement the plaintiff was to pay the second defendant monthly instalments of RM150 commencing 19 January 1970. He paid four monthly instalments. However, he stopped doing so when the car was detained by the police on 30 April 1970 on suspicion that it has been stolen. During the course of police investigations the police offered to return the car to the plaintiff subject to certain conditions but the plaintff refused to accept the offer. On 4 July 1970 the plaintiff terminated the hire-purchase agreement and on 10 September 1970 sued both the defendants for breach of contract; he alleged that there has been a breach of the condition implied by the then s. 6(1)(b) of the Hire Purchase Act, 1967 which reads:

> In every hire purchase agreement there shall be an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass.

Meanwhile on 31 October 1970 the second defendant took possession of the car from the police subject to certain conditions, *inter alia*, that they should not offer the car for hire or sale to anyone and that they should not sell or transfer it without the leave of the Court. Finally the police cancelled the conditions to which the car had been returned to the second defendant.

The Sessions Court dismissed the plaintiffs claim against both defendants and his appeal to the High Court was also dismissed ([1973] 1 MLJ 117). He then appealed to the Federal Court; Suffian FJ said (at page 67) that from the language of the hire-purchase agreement the first defendant, i.e. the car dealer, faded out of the picture and the contract that remained was between the plaintiff and the second defendant, i.e. the finance company, and accordingly the plaintiff has no claim against the car dealer. With regard to the action against the finance company, the plaintiff contended as follows:

(a) that under s. 6(1)(b) there was an implied condition on the part of the finance company that they would have a right to sell the car at the time when the property in it was to pass;

(b) that the property in it was to pass after the final instalment had been paid or after the plaintiff (if he had opted to do so) has given notice under s. 13(1) before the date for the final instalment that he intended to complete the purchase by paying the net balance due under the agreement, and

(c) that when the police seized the car as a suspected stolen car there was no actual breach by them of the implied condition as provided for under the said s. 6(1), but nevertheless, there was anticipatory breach by them, entitling the plaintiff to rescind the agreement and sue for damages for breach.

Suffian FJ said (at page 68):

> With respect we cannot accept the plaintiff's arguments. In our view the principle enunciated in *Universal Cargo Carriers* [1957] 1 All ER 70, *supra*, does not apply. The principle there is that anticipatory breach of a contract can occur only if there has been some act by the **defendant** himself to make it obvious that he has renounced his liabilities under the contract or that it has become impossible for him to perform. Here on the other hand there has been no such act by the second defendant. If performance has been made impossible it was not because of their act but because of the intervention of a third party, the police.

In the instant case, Counsel for the appellant insisted that similarly the implied condition and warranty provided for under s. 7(l)(b) and (c), respectively, of the said Act is not applicable. He argued that those provisions contemplate that the owner shall have a right to sell the goods or that the goods shall be free from any charge or encumbrance "at the time when the property is to pass". He insisted that "the time when the property is to pass" under a hire-purchase agreement is when you have made your last instalment payment - in the instant case, the respondent has not made his last payment and hence the said implied condition or warranty is not applicable. He agreed that at common law we look at the time when we enter into the contract to see whether a person is the owner of the property at the time of hiring, i.e., on the date the agreement was entered into, but contended that under the said Act, we look at the time when the property is to pass, i.e, when the hirer has paid the last instalment. He contended that although these common law rights have been preserved by s. 7(4) of the said Act, these rights can still be excluded by the terms under a hire-purchase agreement or other documents. Section 7(4) reads:

> Nothing in this section shall prejudice the operation of any other written law or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

He pointed out that in the instant case, these common law rights have been excluded by virtue of clause 4 of the said agreement (page 108 of the Appeal Record) which specifically excludes warranties in respect of second-hand vehicles; clause 4 reads:

> The Owner gives no warranty whatsoever in respect of the Goods as to description fitness roadworthiness repair or otherwise other than in the case of

a new Goods only those necessarily implied by the Act nor shall the Owner be responsible for any delay in delivery.

To support his argument that common law rights can be excluded from a hire-purchase agreement, he referred to the case of *Richards v. Alliance Acceptance Co. Ltd. & Anor.* [1976] 2 NSWLR 96. In that case, the b appellant (the hirer) entered into a hire-purchase agreement with a finance company (the owner) whereby the appellant hired a prime mover and semi-trailer purchased from a dealer. After paying the deposit but before paying the first instalment due under the agreement, the appellant formed a belief in consequence of police enquiries, that the semi-trailer was stolen. He then told c the finance company that he would pay nothing further until the question of the title was cleared up and without consulting the finance company returned the prime mover to the dealer and surrendered the semitrailer to the police. The appellant then purported to rescind the agreement and sued the finance company for the return of the deposit. The finance company counter-claimed d for the first instalment of hire. Section 5(5) of the Hire Purchase Act 1960 of New South Wales (which is the equivalent of s. 7(4) of our Hire-Purchase Act) provides:

> Nothing in this section prejudices in any way any other enactment or rule of law whereby any condition of warranty is to be implied in any hire-purchase e agreement.

Samuels JA said (at page 101):

> In a hire-purchase agreement under the Hire-Purchase Act, 1960, hereinafter called "the Act", the hirer derives rights both from the Act and from the common law. f At common law it was an implied condition of the agreement that the bailor (here the respondent) was the owner of the goods at the time of the delivery: *Karflex Ltd. v Poole* [1933] All ER Rep. 40.
>
> But the Act has reduced the breadth of this protection, because of the terms of s. 5(l)(b) which provides that in every hire-purchase agreement there shall be "... g an implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass: ..."
>
> However, conditions and warranties which might be implied at common law are preserved by the terms of s. 5(5). But also such stipulations are vulnerable to exclusion by the terms of the hire-purchase agreement itself: s. 36(1)(i). * Hence, h in the present case, the appellant would have been entitled to invoke the implied condition as to title at common law preserved by s. 5(5), had it not been for the presence in the agreement of the exclusion contained in cl. 8(b), which was in those words "So far as the law provides all other conditions and warranties which could be implied in this agreement are also negatived and excluded.
>
> i It was, indeed, common ground that the existence of cl. 8(b) was fatal to any condition which might otherwise have been derived from *Poole's* case ...

(* Section 36(1)(i) reads:

Any provision in any agreement or other document whereby -

(i) except as expressly provided by this Act the operation of any provision of this Act is excluded, modified, or restricted, is void).

Counsel then submitted that the respondent has also signed the said letter of indemnity which he argues is a very good defence to the respondent's averment that there shall be an implied warranty that the respondent shall have and enjoy quiet possession of the said vehicle as provided for under s. 7(1)(a) of the said Act. He argued that, this letter of indemnity is only meant for second-hand vehicles and that by virtue of clause 3 therein the respondent is estopped from making this claim. The said letter of indemnity, which was prepared by the appellant and addressed to the appellant and signed by the respondent, reads:

Dear Sirs,

Second-hand Motor Vehicle:

Make & Model: Mercedes Benz 200

Registration No.: JBX 2923

Engine No.: 10298020751619

Chassis No.: WDB 1232232A289139

Present Registered Owner: Tan Chin Cheng

Ownership Claim As Legal Owner By: Tan Chin Cheng

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1. I hereby request you to purchase the above-mentioned vehicle (hereinafter called "the vehicle") for the purpose of letting the same to me on hire-purchase.

2. I confirm that I have personally verified the particulars in respect of the vehicle and I hereby warrant you the truth and correctness of the particulars as set out above. In particular I have satisfied myself that the legal owner of the vehicle is as set out above and the present registered owner at the Registry of Motor Vehicles is as set out above and that the vehicle is free from any encumbrances or ownership claim as set out above.

3. In consideration of your agreeing at my request to purchase the vehicle from the legal owner and the present registered owner as set out above for the purpose of letting the vehicle to me on hire-purchase thereafter, I hereby agree, convenant and undertake as follows:

   i) to indemnify you and to keep you indemnified against all actions, claims, loss, damages and costs which you may sustain as a result of any party other than the present registered owner and the legal owner

claiming title to or any interest in the vehicle including your solicitor's fees on a solicitor and client basis in defending any such claim; and

ii) in the event of your losing title and possession of the vehicle to any party other than the above-mentioned legal owner, and on written demand by you, to pay to you by way of agreed liquidated damages the unpaid balance of the total hire-purchase price less unpaid term charges under the hire-purchase agreement to be entered between us in respect of the vehicle.

Counsel for the appellant also submitted that this letter of indemnity, which is only meant for second-hand vehicles, does not contravene s. 34(g) of the said Act which provides that:

Any provision in any hire-purchase agreement whereby -

(g) except as expressly provided by this Act, the operation of any provision of this Act is excluded, modified or restricted, shall be void and of no effect.

Counsel further argued that s. 34 only applies to a hire-purchase agreement and does not at all apply to other documents, meaning which, he is contending that the said letter of indemnity is not part of the said agreement.

With regard to the appellant's counter-claim, Counsel argued that the appellant has suffered a loss in that they have paid a sum of RM25,000 to the said Tan being the balance owing under the hire-purchase account pursuant to the said letter of indemnity signed by the respondent; he submitted that the undertaking by the respondent in that letter of indemnity would entitle the appellant to make the counter-claim. In conclusion, he urged that the appeal be allowed and that judgment in the appellant's favour be given in respect of the counter-claim based upon the said letter of indemnity.

In opposing the appeal, Counsel for the respondent submitted that when the respondent and the appellant entered into the said agreement, the said Tan faded out of the picture because he has assigned his rights with regard to the said vehicle to the appellant. He referred to a letter (page 102 of the Appeal Record) which was introduced in evidence wherein Tan had written to the appellant as follows:

I/We hereby declare that I/we are the absolute owner without encumbrances of any kind of the above vehicle and I/we transfer all my/our rights, title and interest in the said vehicle to you as the owner and Ehwan Bin Saring of 37, Jalan Pinggiran Ukay, Jalan Ulu Kelang, Ampang, Selangor as hirer in respect of Ehwan Bin Saring obtaining a Hire Purchase loan from M/s. Public Bank Berhad.

The following consideration shall be treated as full payment of the said vehicle.

Deposit paid by Ehwan Bin Saring	- RM57,000
Balance to be paid by Public Finance Berhad	- RM25,000
Total consideration	- RM82,000

I/We hereby confirm that I/We have already received from Ehwan bin Saring the deposit sum of RM57,000 (Ringgit Malaysia: Fifty seven thousand only).

I/We further undertake to fully indemnify Public Finance Berhad against all losses incurred in consequence resulting from the above stated transaction and to refund all monies should registration of the said vehicle be refused by the Registrar and Inspector of Motor Vehicles for any reason whatsoever.

Counsel for the respondent submitted that upon paying Tan the balance of RM25,000 the appellant became the owner of the said vehicle. He also pointed out that the fact that the appellant claims to be the owner of the vehicle is also reflected in the preamble to the said agreement (page 108 of the AppeaI Record) which reads:

AGREEMENT made between PUBLIC FINANCE BERHAD a company incorporated in Malaysia and having its Registered Office at Tingkat Kelima, Wisma Perdana, Jalan Dungun, 50490 Kuala Lumpur, (hereinafter called "**the Owner**" which expression shall where the content so admits include its successors and assigns) of the first part and the hirer named and described in Part I of the Schedule hereto (hereinafter called **"the Hirer")** of the second part.

WHEREBY IT IS AGREED as follows:

1. THE Owner will let and hire the Goods ...

Counsel contended that from the contents of the said agreement the appellant took the position that the said payment of RM57,000 (as discussed earlier) by the respondent is payment to themselves. He argued that Tan has now faded out of the picture and that this was exactly the position the second-hand car dealer was placed in *Ahmad Ismail v. Malayan Motor Company & Anor*. (referred to and discussed earlier) wherein Suffian FJ said that from the language of the hire-purchase agreement, the car-dealer (in the instant case it would be the said Tan) faded out of the picture and the contract that remained was between the plaintiff (in the instant case the respondent) and the finance company (in the instant case the appellant) and accordingly the plaintiff has no claim against the car-dealer.

Counsel further argued that in the instant case there was total failure of consideration and that the respondent did not get what he bargained for. To support his contention he referred to the *dicta* in the case of *Goh Yew Chew & Anor v. Soh Kian Tee* [1970] 1 MLJ 138 where Ali FJ said (at page 141):

This principle or doctrine of failure was stated by Viscount Simon LC in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32 in these words:

> The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use ...

Counsel also referred to Treitel on *The Law of Contract* (7th Edn., 1987) at page 37 which defines "total failure of consideration" as follows:

> DEFINITION. A contracting party can recover back money paid under a contract if there is a "total failure of consideration," i.e. if he has not got any part of what he bargained for.

Counsel contended that the said letter of indemnity is invalid and unenforceable because it contravenes s. 24(b) of the Contracts Act 1950 and s. 34 of the said Act. Section 24(b) of the Contracts Act reads:

> The consideration or object of an agreement is lawful, unless -
>
> (b) it is of such a nature that, if permitted, it would defeat any law;

and the relevant paragraphs of s. 34 of the said Act provides:

> Any provision in any hire-purchase agreement whereby -
>
> (a) any right conferred on the hirer by this Act to determine a hire-purchase agreement is excluded or restricted;
>
> (b) the hirer is subject to any greater liability on the determination, in any manner whatosoever, of the hire-purchase agreement or of the bailment thereunder, than the liability to which he would be subject if the hire-purchase agreement were determined in accordance with this Act; and
>
> (g) except as expressly provided by this Act, the operation of any provision of this Act is excluded, modified or restricted;
>
> shall be void and of no effect.

He argued that if the said letter of indemnity is held to be valid, it will defeat s. 7 of the said Act. He pointed out that the said s. 24(b) and s. 34 of the Contracts Act and the said Act, respectively, were tied down in the letter of indemnity which is part and parcel of the said agreement and to circumvent the law, the appellant has asked the respondent to sign the letter of indemnity the contents of which indirectly contravenes those two sections referred to

above. He argued that common law provides that when you sign a hire-purchase agreement, you must have title and this common law principle has been preserved by s. 7(4) of the said Act which provides that "Nothing in this section shall prejudice the operation of other written law or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement." Counsel contended that the appellant must be in a position to transfer the vehicle at any time if the respondent decides to end the hiring by paying the net balance due under the said agreement.

He further argued that the contract has been frustrated when the vehicle was seized and that the parties must now be put back in their original position, *viz*., the appellant must refund to the respondent all monies already paid to the appellant. He then referred to s. 57(2) and 66 of the Contracts Act which reads:

> s. 57 (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of any event which the promisor could not prevent, unlawful, becomes void when the act itself becomes impossible or unlawful.
>
> s. 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In his reply Counsel for the appellant argued that where you have an Act you cannot import common law; furthermore although the position at common law has been preserved by s. 7(4) of the said Act, the letter of indemnity has excluded that common law position. He then again insisted that the letter of indemnity is not part of the said agreement and hence is not caught by s. 34 of the said Act.

With respect, I cannot see how the above arguments forwarded by the appellant can hold water. The conduct and actions on the part of the appellant clearly show that when the said agreement was entered into, the appellant has represented that they are the owners of the said vehicle which, to me, would mean that they represented that they were capable of giving a good title to the respondent whenever the latter decides to pay the net balance due which would then result in the hiring coming to an end; this has been agreed to under the said agreement as is reflected in clause 8 (page 109 of the Appeal Record) which reads:

> This Agreement shall not be nor be construed to be a purchase or an agreement for the purchase of the Goods by the hirer but if the Hirer shall duly perform and observe all the stipulations and conditions in this Agreement contained on his part to be performed and observe and shall in manner aforesaid pay to the Owner all sums of money payable to the Owner by the Hirer hereunder the hiring shall come to an end and the Goods shall become the property of the Hirer and Owner will assign and make over all the Owner's right benefit and interest in

the same to the Hirer but until all such payments as aforesaid shall have been made the Goods shall remain the absolute property of the Owner.

The evidence adduced at the trial however have shown that about six weeks after the said agreement was executed, the said vehicle was seized by the Customs and since that seizure, the vehicle has not been returned to either the appellant or the respondent. The subject-matter of the said agreement is now in the possession of the Customs and has not been returned whereas in *Ahmad Ismail v. Malayan Motor Company & Anor. (supra)*, which was referred to by Counsel for the appellant, the position was different - in that case, the police returned the vehicle upon finding that the vehicle was not in fact a stolen vehicle and as such, there could be no question that the title could not pass to the hirer at the time when the property was to pass. In the instant case, it would seem that the said vehicle is now deemed to be forfeited by the Customs pursuant to s. 128(1) of the Customs Act (referred to earlier). That being so, I am of the view that in accordance with s. 57(2) of the Contracts Act, the said agreement has become void as it would now be impossible for the appellant to assign and make over all its right, benefit and interest in the said vehicle as they now have a defective title. When the appellant entered into the said agreement, it stood in the shoes of the said Tan; they have received an advantage under the said agreement, namely, the RM57,000 which the respondent has paid towards the purchase of the said vehicle. Accordingly, since the said agreement is now void as it would now be impossible for the appellant to pass a good title over the said vehicle, I am of the view that they are bound, in accordance with s. 66 of the Contracts Act, to return the RM57,000 which they have received from the respondent I would think that upon these grounds alone that the respondent would be entitled to his claim.

However the appellant has insisted that under s. 7(1)(b) of the said Act the implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass only arises when the last instalment has been paid and not earlier. They also contended that s. 7(1)(b) is not applicable as the vehicle is a second-hand vehicle and that be that as it may, that implied condition has been precluded by the undertaking given by the respondent in the said letter of indemnity. They also argued that the position at common law, namely, that you look at the time when you enter into the hire-purchase agreement, is not applicable. The position at common is best illustrated in the case of *Warman v. Southern Counties Car Finance Corporation Ltd.* [1949] 1 All ER 711 wherein it was held that under a hire-purchase agreement, the warranty of ownership is given and becomes effective at the date of the agreement and not when final payment is made. In that case, the plaintiff (the hirer) entered into a hire-purchase agreement with the defendants in respect of a motor car. Under the agreement a sum of L155 was paid by the plaintiff as an initial payment to the defendants and the plaintiff agreed to take the vehicle on hire and to pay each month the sum of L9

18s., and when he had paid the requisite number of instalments, he was to pay another 1s. and the car then became his property. He completed the monthly payments according to schedule and upon the final payment the car then ostensibly became his property. It appears, however, that, in fact, the car was not the property at any time of the defendants although they legitimately believed that they were the owners of the vehicle when they entered into the hire-purchase agreement with the plaintiff. The vehicle was then handed to the rightful owner by the plaintiff. Consequently the plaintiff sued the defendants for damages for breach of the agreement and in particular for damages for breach of express warranty that the defendants were the owners of the vehicle. The defendants contended that, in assessing damages for breach of warranty, an allowance should be made for the reasonable charge of hiring the car during the seven months in which the plaintiff has used it; Finnemore J held that no such allowance should be made and in allowing the plaintiffs claim, said (at page 713):

> ... when the agreement was entered into and an option to purchase was given, as from the moment when the hire-purchase agreement had been signed the plaintiff would have been entitled in law to have paid the whole of the balance at once and had the ownership there and then vested in him. The defendants were clearly unable to give him the proper title at any moment from the time of the contract up to Apr. 22 when the final payment was made by him and received by the defendants. It is plain that there was a breach of the agreement which continued throughout and that the title for which the plaintiff had contracted was never given to him and could never have been given to him because it was never the defendants' to transfer.

and at the same page said:

> The damage flowed from the fact that the defendants purported to hire and sell to him something which, although they did not know it, was not theirs to hire or to sell.

I think it is clear that s. 7(4) of the said Act has preserved the common law position, *viz.*, the owner must have a good title to pass when he enters into a hire-purchase agreement. I cannot see any merit in the appellant's contention that the common law position is not applicable in the instant case on the basis that the vehicle is a second-hand vehicle and that such an implied condition can be excluded by the said letter of indemnity. I would think that it cannot be disputed that the appellant has held itself out to be the owner of the said vehicle since 27 March 1991 when the said agreement was executed and has represented that they are capable of giving a good title to the respondent whenever he might choose to end the hiring by paying the net balance due; upon that event occuring, the appellant has warranted, in the said clause 8, that the vehicle shall become the property of the respondent and that they will assign and make over their right, benefit and interest in the vehicle to the respondent. The evidence has however shown that the appellant was obviously

incapable of doing that from the time when they entered into the said agreement. Under the circumstances I cannot see any merit in the appellant's argument that there was no breach of s. 7(1)(b) of the said Act.

The appellant has insisted that the words "at the time when the property is to pass" means only at the time when the last instalment has been paid according to the agreed schedule for payments and not before that. I disagree. It is my view that the words "at the time when the property is to pass" means at the time when a hirer decides to pay all the sums due under a hire-purchase agreement and not necessarily only upon payment of the last instalment when it becomes due - in other words, at the time when a hirer exercises his option to purchase. A breach of s. 7(1)(b) amounts to a breach of condition and it is a breach which goes to the root of the agreement which would entitle the hirer to recover the amount already paid by him. That is the position at common law and that is also the position under the Act regardless of whether the goods are new or otherwise. In *Karflex Ltd. v. Poole* [1933] All ER Rep. 40, the plaintiff purchased a motor-car from a man named King, who held himself out to be the owner of the car. Subsequently by a hire-purchase agreement the plaintiffs, who described themselves as the owners of a motor car, agreed to hire it to the defendant on the terms that in consideration of an initial payment of L95 the defendant has the option to purchase it at any time during the currency of the agreement on making certain agreed payments. On the hirer falling into arrears with his monthly payments, the plaintiffs re-took possession of the motor car and commenced an action to recover compensation. The defendant counter-claimed for repayment of the initial payment which he had paid to the plaintiffs on entering into the agreement as he could ascertain that at the date of the agreement the plaintiffs were not in fact the owners, it having been sold to them by a person who had no title to it. The trial Court dismissed the plaintiff's claim and gave judgment for the defendant on the counter-claim and the plaintiffs appealed. The appeal was dismissed; Acton J said (at page 48):

> The agreement throughout seems to me to be designed to express that the plaintiffs hold themselves out to be and are in fact the owners of this vehicle, and, in my view, it is impossible to resist the conclusion that, according to the true intention of the parties, the whole agreement was conditional upon the plaintiffs being the owners of the vehicle.

At page 50, Goddard J said:

> I think that the judgment, both as to the claim and the counter-claim can, in the particular circumstances of this case, be supported as a matter of mere construction of the agreement. That, of course, is not a point of general application, but in this agreement the plaintiffs, who have no title to this car are described throughout as the owners of the car ..., and they undertake in the agreement an obligation to pass the property in the car to the hirer at any moment after the signing of the agreement when he chooses to pay the full amount of

> the purchase price, whether by means of instalments or by a lump sum, which he has an option of doing.
>
> In those circumstances it seems to me that there is an express condition in this contract that the plaintiffs are the owners of the car. It is not a matter of warranty, it is a matter of a condition. It must be, in my judgment, a condition that they are the owners of the car which they purport to deal with in this manner by hire-purchase. That would be sufficient to deal with the claim but, having listened to the argument of Counsel for the plaintiffs, I think it desirable to say that where a person is letting out furniture or goods of any description on hire-purchase he does impliedly warrant, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out.

In the instant case, the appellant, who claims and represented that they are the owner of the said vehicle when they entered into the said agreement with the respondent, has later discovered that their title was defective. That, to me, is breach of condition which goes to the root of the said agreement so that upon such a breach, liability on the part of the respondent under the agreement comes to an end and consequently he would be entitled to recover the amount paid by him to purchase the said vehicle from the appellant who are now standing in Tan's shoes from the date of the said agreement.

In arguing that the words "at the time when the property is to pass" only arises when a hirer has made his last payment under a hire-purchase agreement, Counsel for the appellant has referred to the case of *Ahmad Ismail v. Malayan Motor Company & Anor. (supra)* which according to him supports such a contention. I disagree. The facts there were different. In that case the police, who had earlier detained the motor car on suspicion that it, has been stolen, has subsequently offered to return the vehicle subject to certain conditions but the hirer refused to accept the offer and terminated the hire-purchase agreement. The company later took possession of it subject to the conditions but consequently the police cancelled the conditions. At the appeal stage in the High Court (*Ahmad Ismail v. Malayan Motor Company & Anor.* [1973] 1 MLJ 117), Mohamed Azmi J said (at page 119):

> There is no evidence here that the finance company's title to the Morris car was defective in any way. In my judgment, the fact that the car was detained temporarily for purpose of police investigation on suspicion - which turned out to be unfounded - did not affect its title. ... There can only be a breach of s. 6(l)(b) of the Hire-Purchase Act if "at the time when the property is to pass" the finance company had no right to sell the car to the plaintiff"

The police in that case were willing to return the vehicle to the hirer but he refused to accept it whereas in the instant case, the Customs have confiscated the vehicle. There is no evidence to show that the Customs were ready or willing to release the said vehicle nor is there any evidence to show that the vehicle was subsequently released either to the appellant or respondent.

However, Counsel for the appellant has argued that no person was prosecuted for an offence under the said s. 135(1)(d) of the Customs Act; be that as it may, I am of the view that s. 128(1) of the Customs Act (referred to earlier) would still entitle the Customs to forfeit the said vehicle notwithstanding that nobody was prosecuted and thus the fact that nobody was prosecuted would be irrelevant under the circumstances.

Counsel for the appellant has also argued that any common law right which the respondent had, have been excluded by clause 4 (referred to earlier) of the said agreement - he argued that the said clause 4 specifically excluded warranties in respect of second-hand vehicles. I cannot see any merit in that argument - from my reading, the said Act does not seem to differentiate between new goods and second-hand goods as far as ownership is concerned or provide that the implied condition and warranties under s. 7(1) do not apply to second-hand goods. Section 7(2) merely provides that an implied condition that the goods shall be of merchantable quality shall not be implied if the goods are second-hand goods and the agreement contains a statement to the effect that the goods are second-hand. The position is also similar in s. 7(3) which provides that an implied condition that the goods shall be reasonably fit for a particular purpose which is made known to the owner or dealer shall not be implied if the goods are second-hand goods. It is clear that both sub-sections have nothing to do with ownership or title. Consequently, from my reading of the said clause 4 of the said agreement, it only stipulates that the appellant "gives no warranty whatsoever in respect of the Goods as to description fitness roadworthiness repair or otherwise other than in the case of new Goods only those necessarily implied by the Act ..."; I fail to see how this clause has excluded any implied condition or warranty that the respondent has under s. 7(1) of the said Act. Clause 4 of the said agreement has nothing to do with ownership and this clause does not at all exclude any implied condition or warranty whether under the said Act or at common law and as to why Counsel for the appellant has contended that clause 4 excludes the common law position as to title escapes me. In my view, the case of *Richards v. Alliance Acceptance Co. Ltd. & Anor. (supra)* cited by Counsel for the appellant has no bearing upon the instant case. With respect I do not even think that such an implied condition can be specifically excluded from a hire-purchase agreement. The said agreement in the instant case was conditional upon the appellant being the owner of the said vehicle and the appellant has been described throughout as the owner of the vehicle. The said agreement has obviously become impossible to perform if the appellant is found to have a defective title and it becomes void when the appellant cannot pass a good title to the respondent unless at the end of the day, the appellant can prove that they had a good title throughout - this they have failed to do so.

With regard to the letter of indemnity, I would tend to agree with Counsel for the respondent, that that document forms part and parcel of the said agreement. The conduct of the appellant confirms this. DW1, an employee of

the appellant who gave evidence, has agreed that the letter of indemnity forms part of the agreement; he explained that the said letter of indemnity was prepared by the appellant and its purpose was to protect the appellant's interest. Counsel for the appellant has however argued that the said letter of indemnity is independent of the said agreement and is only meant for second-hand vehicles; furthermore it did not contravene s. 34(g) of the said Act as that section only applies to a hire-purchase agreement and not, to other documents. I fail to see any merit in such an argument. The appellant is pursuing his counterclaim based upon the said letter of indemnity which to me would imply that he has tied up both the said agreement and the letter of indemnity together and is making his counterclaim based upon these two documents read together. To me, the appellant seems to be taking the stand that it can make a claim against the respondent based upon the said letter of indemnity as it is tied up with the said agreement but the respondent cannot raise any issue about the said letter of indemnity in his defence against the counter-claim as that document does not form part of the said agreement and that the said document can preclude any implied condition or warranty provided under the said Act; in other words, "heads I win, tails you lose".

I am of the view that the said letter of indemnity is void; to me, it forms part of the said agreement but it has been worded as such to exclude the provisions of law which are implied under the said Act. It is my finding that that document goes against the provisions of the said Act which is meant to provide protection to hirers and it, being part and parcel of the said agreement, is void under s. 34(a), (b) and (g) of the said Act. The right of the respondent to seek relief under the provisions of the said Act and also at common law has been wrongfully precluded by that letter of indemnity. The said agreement has become impossible to perform and the respondent as hirer cannot now have and enjoy quiet possession of the vehicle but that, to the appellant, seems to be irelevant although it is clear that the agreement has been determined when the said vehicie was seized by the Customs and remained so until the trial. As far as the appellant is concerned, pursuant to the terms in the said letter of indemnity, if the appellant loses the title whilst the respondent is still the hirer, the respondent cannot treat that as a failure of consideration and claim from the appellant what he has paid even though title was lost through no fault of the respondent, but the respondent must still pay what is due to the appellant even though the subject-matter has gone. I cannot fathom such a stand. There clearly has been a total failure of consideration and that being so I cannot see how the appellant can claim that the implied condition as to title provided for under s. 7(1)(b) of the said Act is not applicable. In *Rowland v. Divall* [1923] 2 KB 500 the plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover the purchase money that he had paid, based on a total failure of consideration. At page 506 Atkin LJ said:

> It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the *de facto* possession, but the seller had not got the right to possession and consequently could not give it to the buyer.

and at page 507 said:

> The buyer accepted the car on the representation of the seller that he had a right to sell it, and inasmuch as the seller had no such right he is not entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive - namely, the property and right to possession - and, that being so, there has been a total failure of consideration.

In the instant case, when Tan sold the said vehicle to the respondent, the former informed the appellant by letter (page 102 of the Appeal Record) that he is the absolute owner of the said vehicle and that he is transferring all his rights, title and interest to the appellant. In the same letter, Tan also undertook to indemnify the appellant against all losses incurred in consequence resulting from the transaction and to refund all monies should registration of the vehicle be refused by the Registrar and Inspector of Motor Vehicles for any reason whatsover. A letter from the Road Transport Department introduced in evidence (page 93 of the Appeal Record) and dated 8 May 1991 reveals that the department was not in a position to register the transfer of ownership as the vehicle was under investigation in relation to falsification of documents. The appellant did not know that Tan had a defective title but to me, that would be irrelevant. The appellant has since the date of the said agreement represented that they are the owners of the vehicle and if they cannot make good such a claim, the said agreement has now become void.

The learned Sessions Court Judge has found that the appellant's title was defective and hence the appellant was not able to transfer a good title to the respondent. She was also of the view that it was beyond the capacity of the respondent to give such an undertaking as found in the said letter of indemnity as he can only depend upon what, he sees, *viz*, the vehicle and the relevant documents relating to ownership at the time he entered into the said agreement with the appellant; he was not in a position to go behind that and investigate whether the said vehicle was imported with valid and proper documentation. After having found that the said agreement has been frustrated when the said vehicle was seized and that the appellant has breached the implied condition and warranties provided for under s. 7(1) of the said Act, she allowed the respondent's claim for RM57,000 with interest and costs and dismissed the appellant's counterclaim. I agree with her decision and that being so, this appeal is dismissed with costs.